HEE AWA & ORS. v. SYED MUHAMMAD SAZALAY & ANOR.

[S.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Wan Hamzah S.C.JJ.) September 21 & November 26, 1987]

[Johor Bahru – Supreme Court Civil Appeal No. 494 of 1986]

Civil Procedure – Joinder of parties – Application by defendants to join person as party – Objection by plaintiff – Discretion of court – Application allowed to ensure that all matters in dispute in the cause be effectually and completely determined and adjudicated upon – R.H.C. 1980, O.15 r. 6 & O. 16 r. 6.

In this case, there was a road accident involving a motorcycle and a government motor van in which the pillion rider of the motorcycle was killed and a passenger in the motor van was injured. The injured passenger claimed damages for negligence against the motorcyclist in the Sessions Court and the van driver and the Government of Malaysia were made third parties. The parents and administrator of the estate of the pillion rider (appellants in the appeal) claimed damages under sections 7 and 8 of the Civil Law Act 1956 in the High Court against the van driver and the Government of Malaysia (respondents).

The respondents applied under Order 15 rule 6(2)(b) of the Rules of the High Court 1980 for an order that the motorcyclist be joined as a party. The application was dismissed by the Senior Assistant Registrar but on appeal, the judge of the High Court reversed the order and ordered the motorcyclist to be joined as a co-defendant in the action, despite objections by the appellants. The appellants appealed.

Held, dismissing the appeal: (1) the respondents' application to add the motorcyclist as a co-defendant falls squarely within the terms of Order 15 rule 6(2)(b) of the Rules of the High Court 1980. The respondents have a choice to proceed either under Order 15 rule 6(2)(b) or Order 16. There is absolutely nothing in the Rules of the High Court 1980 to prevent the respondents from making the choice;

(2) in the circumstances of this case, the order allowing the motorcyclist to be joined as a co-defendant is to ensure that all matters in dispute in the cause be effectually and completely determined and adjudicated upon as envisaged by Order 15 rule 6(2)(b) of the Rules of the High Court 1980. The learned judge did not therefore err in law in exercising his discretion in favour of the respondents.

Cases referred to:

(1) *Amon* v. *Rapheal Tuck & Sons Ltd.* [1956] 1 Q.B. 357.
(2) *Fire Auto & Marine Insurance Co. Ltd.* v. *Greene* [1964] 2 Q.B. 687.
(3) *Gurtner* v. *Circuit* [1968] 2 Q.B. 587.
(4) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52, 55.
(5) *Cheah Fook Chuan* v. *Chai Chan Poh* SCCA No. 24 of 1987 (no written judgment).
(6) *Byrne* v. *Brown* (1889) 22 Q.B.D. 657, 666-7.
(7) *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.* [1945] 2 All E.R. 211, 212-213.

SUPREME COURT.

Lee Bian Tian for the appellants.

Tee Geok Hock (Federal Counsel) for the respondents.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the judgment of the court): In a road accident involving a motorcycle and a government motor van, the pillion rider of the motorcycle was killed and a passenger in the motor van was injured. The injured passenger claims damages for negligence against the motorcyclist in the Sessions Court, whilst the parents and the administrator of the estate of the deceased pillion rider (appellants in this appeal) claim damages under sections 7 and 8 Civil Law Act 1956 in the High Court against the van driver and the Government of Malaysia (the respondents). In the Sessions Court, the respondents were made third parties under Order 16 of Rules of the High Court 1980 by the motorcyclist, whilst in the High Court, the respondents had elected to apply under Order 15 rule 6(2)(b) for an order that the motorcyclist be joined as a party. The application was dismissed by the Senior Assistant Registrar, but on appeal, V.C. George J. reversed the order and ordered the motorcyclist to be joined as a co-defendant in the action, despite objections by the appellants. Hence, the present appeal.

In the affidavit in support of the respondents' application, Mr. Tee Geok Hock, Federal Counsel, deposed in paragraph 5 that he verily believed that the motorcyclist ought to be joined as a co-defendant to ensure that all matters in dispute in the suit might be effectually and completely determined and adjudicated upon, and/or that there existed questions of responsibility in causing the said accident and it would be just and convenient to determine the liability as between the motorcyclist and the van driver as well as between the parties to the suit.

It is the contention of the appellants, both here and in the court below, that Order 15 rule 6(2)(b) of the Rules of the High Court 1980 (RHC) cannot be invoked by the respondents, and that the proper way to bring in the motorcyclist is by third party procedure under Order 16 RHC. We are told that by making the order as he did, the learned judge had in effect compelled the appellants/plaintiffs to add another defendant in the action against his will, and thereby breached the principle of tort that where liability of tortfeasors is joint and

several, a plaintiff is entitled to sue anyone of them.

From the provision of Order 15 rule 6(2)(b) RHC, it is clear that the court has a discretion to grant or refuse the order of making any person as a party with the exception that such order cannot be made to add a person as a plaintiff without his consent. The order can be granted either on the court's own motion or on the application of any person who is already a party, or of an intervener who wishes to be added as a party. The person to be added as a party must be a person who ought to have been joined as a party or whose presence in court is necessary to ensure that all matters in dispute may be "effectually and completely determined and adjudicated upon". In *Amon* v. *Raphael Tuck & Sons Ltd.*,[1] where the application to intervene was made against the will of the plaintiff, Devlin J. laid down the following test: would the order for which the plaintiff was asking directly affect the intervener, not in his commercial interest, but in the enjoyment of his legal rights? This test which was based on a narrow interpretation of the rule was applied by John Stephenson J. in *Fire Auto & Marine Insurance Co. Ltd.* v. *Greene*[2] when refusing the application of the Motor Insurers' Bureau to be added as a party. But the narrow interpretation in *Amon* was overruled by the Court of Appeal in *Gartner* v. *Circuit*,[3] which was also a case involving the application of the Motor Insurers' Bureau to be added as defendants to the plaintiff's action. In allowing the interveners' application, it was held that where the determination of an action between two parties would directly affect a third person's legal rights or his pecuniary interests, the court had a discretion under the English RHC Order 15 rule 6(2) to order the third person to be added as a party to the action on such terms as the court considered desirable so that all matters in dispute could be "effectually and completely determined and adjudicated upon". The overruling of *Amon* by *Gurtner* v. *Circuit*[3] was endorsed by the Privy Council in *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*[4] by the following statement:

"It has been sometimes said as in *Moser* v. *Marsden* ([1892] 1 Ch. 487) and *In re I.G. Farbenindustrie A.G.* ([1944] Ch. 41) that a party may be added if his legal interests will be affected by the judgment in the action, but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between 'legal' and 'commercial' interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

With respect, we agree with the wider interpretation of rule 6(2)(b) as enunciated in *Gurtner* v. *Circuit*[3] and also with the test formulated by the Privy Council. We are in agreement with the learned judge's conclusion in this appeal that the respondents' application to add the motorcyclist as a co-defendant falls squarely within the terms of the rule. The respondents have a choice in this circumstance to proceed either under Order 15 rule 6(2)(b) or Order 16. There is absolutely nothing in the Rules of the High Court 1980 to prevent the respondents from making the choice. In our view, the rule does not affect the rights of a plaintiff to procure his remedy against any particular joint tortfeasor of his choice.

The only real issue in this appeal is whether the learned judge has exercised his discretion on correct principles. Although the application before him is not made by an intervener, but by the respondents who are already defendants in this action, the same test should apply. The respondents' objection was not grounded on the fact that the motorcyclist's rights against or liabilities to any party to the action would not be affected by the final outcome of the action, but was based on the irrelevant ground that the appellants would be financially better off if the respondents' application was refused. It is the argument of the appellants that if they obtained judgment, the consequences of allowing the respondents' application to join the motorcyclist as a party under Order 15 would be unfavourable to them as compared to the respondents adopting the third party procedure under Order 16, in the event that the motorcyclist turned out to be a man of straw although he was found to be substantially blamed for the accident. What is good for the goose is also good for the gender, because the financial advantage would occur in reverse in favour of the respondents if the Order 15 procedure were adopted instead of Order 16. What is the purpose of the respondents adopting the third party procedure when there is no hope at all of them being indemnified or getting contribution from an empty pocket motorcyclist? We think this ground of objection has been rightly rejected by the learned judge.

The only remaining matter that we wish to deal with is the reference by Mr. Lee Bian Tian, counsel for the appellants, to a decision of this court in *Cheah Fook Chuan* v. *Chai Chan Poh*,[5] made on July 22, 1987 where the refusal by Anuar J. to

grant an application under Order 15 rule 6(2)(b) was upheld on appeal. Two of us happened to be in that coram, and having refreshed our memory from the Appeal Record and our notes, it is apparent that that appeal was dismissed not because we held that the court had no discretion to grant the order but due to insufficient material in the affidavit in support of the application on which the discretionary power could have been exercised.

One of the objects of the rule is to prevent multiplicity of proceedings (see per Lord Esher M.R. in *Byrne* v. *Brown*[6] and per Evershed J. at pp. 212-213 in *Bentley Motors (1931) Ltd.* v. *Lagonda Ltd.*[7]). The learned Federal Counsel had informed the court below that the respondents would be applying for consolidation of the two actions. In the circumstances, the order allowing the motorcyclist to be joined as a co-defendant is to ensure that all matters in dispute in the cause be "effectually and completely determined and adjudicated upon" as envisaged by Order 15 rule 6(2)(b) RHC. For the above reasons, the learned judge did not err in law in exercising his discretion in favour of the respondents. We would, therefore, dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Lee & Cheah.*

PENANG HAN CHIANG ASSOCIATED CHINESE SCHOOL ASSOCIATION v. NATIONAL UNION OF TEACHERS IN INDEPENDENT SCHOOLS, WEST MALAYSIA

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) July 13, 14 & November 23, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 18 of 1987)

Civil Procedure – Interlocutory injunction – Industrial dispute referred to Industrial Court – Action in High Court – Application for interlocutory injunction allowed – Balance of convenience – Contract not specifically enforceable in High Court – Injunction cannot be granted – Power of Industrial Court to make order for reinstatement – Specific Relief Act 1950, ss. 20(1)(b) & 54(f).

Equity – Interlocutory injunction – Contract the performance of which would not be specifically enforced – Breach of service contract – Dispute referred to Industrial Court – Balance of convenience – Specific Relief Act 1950, ss. 20(1)(b) & 54(f).

The respondents purported to act for certain teachers who were employed by the appellant. Disputes arose between the appellant, as the employer, of the one part and the teachers in the former employment of the appellant of the other part. A complaint was made to the Ministry of Labour and the Minister referred the trade dispute to the Industrial Court. The reference to the Industrial Court was made before the respondents filed the civil suit in the High Court. The respondents applied for an interlocutory injunction and this was granted by the High Court. The appellant appealed.

Held, allowing the appeal: (1) in this case, the learned judge did not appear to give any consideration to the balance of convenience. If he had done so, he seemed to have disregarded the well-established rule that a contract for service or service contract would not be specifically enforced by the High Court (section 20(1)(b) of the Specific Relief Act 1950) and that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced (section 54(f) of the same Act);

(2) it was plain that the granting of the interlocutory injunction in this case was not an exercise of judicial discretion. The appellate court is therefore at liberty to rehear the whole application on its merits;

(3) when a trade dispute had been referred to the Industrial Court, particularly one involving allegation of wrongful dismissal, the High Court should be slow to interfere by way of interlocutory injunction except for very special circumstances;

(4) no special circumstances appear to have been shown by the respondents in the court below nor was any attempt made to establish them during the hearing of the appeal.

Cases referred to:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.
(2) *Hill* v. *C.A. Parson & Co. Ltd.* [1977] 3 All E.R. 1345.
(3) *Poh Swee Siang* v. *Trustees of Tong Khoo Kongsi & Ors.* [1986] 1 M.L.J. 53.
(4) *Vine* v. *National Dock Labour Board* [1957] A.C. 488.

SUPREME COURT.

Raja Abdul Aziz Addruse (*Goh Eng Kee* with him) for the appellant.

Ranjit Rai Sharma for the respondents.

Cur. Adv. Vult.

Seah S.C.J. (delivering the judgment of the court): We allowed the appeal and set aside the interlocutory injunction granted by the Penang High Court dated January 2, 1987 with costs here and below. We indicated that we would give reasons in writing which we now do.

For the purpose of this appeal, we need only state the salient facts. The respondents, National Union of Teachers in Independent Schools, West